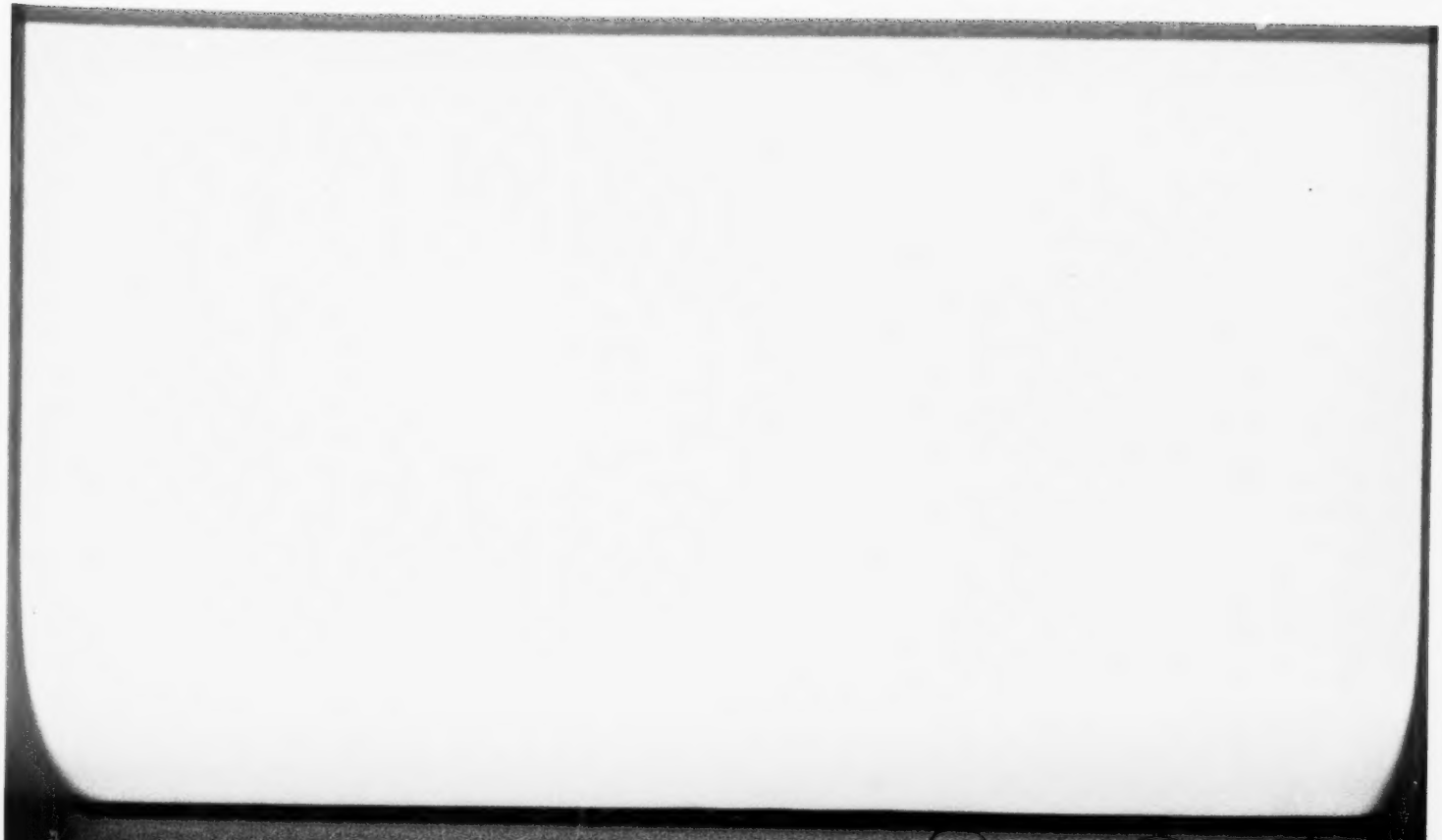

No. 209.

Supreme Court of the United States.

Reply Brief Britton, Browne & Ellenwood for Appellants.

Filed April 15, 1898.

OCTOBER TERM, 1897.

THE NORTHWESTERN NATIONAL BANK, THE RIORDAN MERCANTILE COMPANY, AND THE ARIZONA LUMBER AND TIMBER COMPANY,
APPELLANTS,
v.
B. N. FREEMAN, F. L. KIMBALL, AND J. H. HOSKINS, CO-PARTNERS, AS THE ARIZONA CENTRAL BANK, AND JOHN VORIES.

No. 209.

Appeal from the Supreme Court of the Territory of Arizona.

REPLY BRIEF FOR APPELLANTS.

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I.

The errors are sufficiently assigned. Each error relied upon by the Northwestern National Bank, independent of

its co-appellants, is distinctly so stated, as will appear from assignments II, III (Rec. 108); VII (Rec. 110); XVII (Rec. 113). This is all-sufficient under the very authorities quoted at length in opposing brief. Under such circumstances, the applicable rule is well stated in *Ency. of Pleadings and Practice*, Vol. 2, p. 933, thus:

"An assignment united in by several parties against "whom a joint judgment has been recovered, should be "considered as joint and several, or joint or several, ac- "cording to the nature of the error assigned, and as af- "fecting the respective plaintiffs in error."

II.

The findings of fact made by the Supreme Court of Arizona are conclusive here both upon Court and parties litigant. This has been the consistent ruling since the passage of the act of 1874 requiring such finding of facts by the Territorial Supreme Courts.

Zeckendorf v. *Johnson*, 123 U. S. 617.

Idaho and Oregon Land Co. v. *Bradbury*, 132 U. S. 509, 514.

San Pedro, etc., Co. v. *United States*, 146 U. S. 120, 130.

Mammoth Mining Co. v. *Salt Lake, etc., Co.*, 151 U. S. 447, 450.

Haws v. *Victoria Copper Mining Co.*, 160 U. S. 303, 313.

Gildersleeve v. *New Mexico Mining Co.*, 161 U. S. 573, 577.

Bear Lake Irrigation Co. v. *Garland*, 164 U. S. 1, 18.

In all the foregoing cases it is expressly held that the Court cannot go into the evidence at large, but is restricted to the findings; to errors alleged in exclusion or admis-

sion of evidence on which same are based, and to determination of the correctness or incorrectness of the judgment or decree below as based upon such findings. The rule as thus firmly settled is in accord with the uniform construction of similar statutes as applied to cases in admiralty, equity, or at law.

The Abbotsford, 98 U. S. 440.

Hence discussion of the evidence in this record *aliunde* the findings indulged in opposing brief is not admissible, and requires no reply.

The ultimate fact found by the Supreme Court of the Territory that the Northwestern National Bank, by its purchase of the note and mortgage of August 30, 1893, became "an innocent purchaser for value," is controlling. (R. 105.) The pleadings deny that the mortgages of appellees were valid or were recorded as alleged. (Answer of Northwestern National Bank, par. 3, R. 35; of Arizona Lumber and Timber Co., par. 3, Rec. 31; and of the Riordan Mercantile Co., par. 3, R. 26.) There is no affirmative finding by the Supreme Court of the Territory that *any* of the mortgages here involved were so recorded, and the ultimate finding of the Court *supra* that the Northwestern National Bank became "an innocent purchaser for value" of the note and mortgage held by it is conclusive that no notice of any prior mortgages in law or fact reached the bank, or that it could be chargeable therewith.

III.

A mortgage void as to third parties, by reason of uncertainty, is, of course, good as between the parties. The authorities on our original brief draw this clear distinction, and those cited on opposing brief are to the same effect.

The established rule of law is thus clearly applicable to the case at bar, and in favor of appellants.

IV.

The appellees' mortgages did not cover the increase. No mention thereof is made in them, and the insistence, by the appellee bank, that the subsequent mortgage of January 4, 1893, to appellant, Arizona Lumber and Timber Company, should contain recital that the sheep purporting to be covered by appellees' prior mortgages with respect to numbers should be kept good out of increase, was a new agreement and is a record admission which estops the appellees from asserting that such mortgages *did* cover such increase. The authorities on our original brief demonstrate that as the Northwestern National Bank is in the position of a *bona fide* purchaser under the express finding of the Court, the present claim of appellees that any increase of the sheep claimed to be covered by their motgages is subject thereto, as against that bank at least, cannot be sustained.

V.

We fail to perceive wherein the appeal of the Riordan Mercantile Company is subject to dismissal because of the alleged deficient jurisdictional value involved in its claim. The suit was brought by the appellee bank to foreclose its own mortgage, and its prayer was, *inter alia* (R. 9), that the property be sold by the decree of the Court "and for "distribution under such decree and disposition thereof "as the Court may make."

The decree entered below and affirmed in the Supreme Court of the Territory (Rec. 44) directs the sale and distribution of the proceeds by the sheriff in stated order.

This, in effect, brought the entire fund within the control of the Court. The property and fund involved thus admittedly amounts to the full jurisdictional sum required. Distribution of the whole fund among the parties litigant, and as their equities may be finally marshalled, gives full jurisdiction here of the entire case on behalf of all appellants.

Estes v. *Gunter*, 121 U. S. 183.
Handley v. *Stutz*, 137 U. S. 366, 369.
Texas Pacific Railway Co. v. *Gentry*, 163 U. S. 353, 363.

Respectfully submitted.

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